No. 15-7

In the Supreme Court of the United States

UNIVERSAL HEALTH SERVICES, INC., PETITIONER

v.

UNITED STATES AND COMMONWEALTH OF MASSACHUSETTS EX REL. JULIO ESCOBAR AND CARMEN CORREA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE AMERICAN HEALTH CARE ASSOCIATION AND THE NATIONAL CENTER FOR ASSISTED LIVING AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the "implied certification" theory of legal falsity under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, is viable.

2. If the "implied certification" theory is viable, whether a government contractor's reimbursement claim can be legally "false" under that theory if the provider failed to comply with a statute, regulation, or contractual provision that does not state that it is a condition of payment; or whether liability for a legally "false" reimbursement claim requires that the statute, regulation, or contractual provision expressly state that it is a condition of payment.

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INTEREST OF *AMICI CURIAE*

The American Health Care Association and the National Center for Assisted Living (AHCA/NCAL) are the Nation's leading long-term care organizations. They serve as the national representative of more than 12,000 non-profit and proprietary facilities dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly, and disabled Americans who live in skilled nursing facilities, assisted living residences, subacute centers, and homes for persons with mental retardation and developmental disabilities.*

One way in which AHCA/NCAL promote the interests of their members is by participating as *amici curiae* in cases with important and far-ranging consequences for their members—including cases before this Court raising important questions under the False Claims Act (FCA), 31 U.S.C. §§ 3729–3733. *See, e.g.*, Br. *Amici Curiae* for AHCA et al. in Supp. of Pet'rs, *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280 (2010) (No. 08-304); Br. *Amici Curiae* for AHCA et al. in Supp. of Pet'rs, *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008) (No. 07-214); Br. *Amici Curiae* for AHCA et al. in Supp. of Pet'rs, *Rockwell Int'l Corp. v. United States ex rel. Stone*, 549 U.S. 457 (2007) (No. 05-1272).

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* No counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner's and Respondents' written consents to the filing of this brief have been filed with the Clerk.

AHCA/NCAL and their members have a substantial interest in the questions presented by this case. The Federal Government funds in full or in part a substantial percentage of the services provided by AHCA/NCAL's members, including under the Medicare and Medicaid Acts. Those statutes and their accompanying regulations have been aptly described by this Court as "Byzantine" texts "among the most intricate ever drafted by Congress." *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981); *see also Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000) (describing Medicare as a "massive, complex health and safety program . . . embodied in hundreds of pages of statutes and thousands of pages of often interrelated regulations").

AHCA/NCAL's members daily navigate the complexity of federal health care programs, submitting thousands of payment claims each day. In recent years, however, bounty-seeking *qui tam* relators have aggressively sought to use the so-called "implied false certification theory" (implied-certification theory), arguing that the mere act of submitting a payment claim implicitly certifies that the provider is in compliance with all statutes and regulations. *See, e.g., United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 712 (7th Cir. 2014) (describing relators' argument that compliance with various regulations was a condition of payment because a nursing facility's failure to comply "could result in its termination from the Medicare and Medicaid programs and, consequently, the facility would receive no future payments"); *United States ex rel. Swan v. Covenant Care, Inc.*, 279 F. Supp. 2d 1212, 1220 (E.D. Cal. 2002) (describing

relator's allegations based on nursing facility's alleged noncompliance with conditions of Medicare participation).

Accordingly, AHCA/NCAL have a strong interest in seeing not only that their members can predict with reasonably certainty how the FCA will be applied, but that application of the FCA will be just, reasonable, and consistent with the language of the statute itself.

SUMMARY OF ARGUMENT

The statutory terms at the heart of this case—the words "false" and "fraudulent"—were enacted by Congress in 1863. Since that time, the exponential growth in the Government's role in national economic life has resulted in a fundamental restructuring of the relationship between the Government and the majority of private entities with whom it does business. Federal agencies now maintain comprehensive systems to police compliance with thousands of pages of statutes, regulations, and sub-regulatory guidance, often using specified remedies allowing payment to continue during periods of regulatory noncompliance. It is against this backdrop of the modern administrative state that use of the implied-certification theory has blossomed in recent years, particularly by *qui tam* relators whom this Court has recognized are often "motivated primarily by prospects of monetary reward rather than the public good," making them "less likely than is the Government to forgo an action arguably based on a mere technical noncompliance . . . that involved no harm to the public fisc." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).

The Court should reject the implied-certification theory, which is built on the same faulty legislative-history foundation this Court rejected in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (*Stevens*). There this Court explained that a 1986 committee report provided an inaccurate basis on which to determine the meaning of words—in that case, the FCA's use of the word "person"—enacted by the 1863 Congress. However, in spite of this Court's decision, language in the very same 1986 committee report has served as a central component of lower courts' recognition of the implied-certification theory. In doing so, lower courts have failed to recognize that the statutory terms ostensibly giving rise to the implied-certification theory—the words "false" and "fraudulent"—are creatures of the 1863 Congress, not the 1986 Congress. There is no evidence that the 1863 Congress intended to create FCA liability based on the legal fiction that the mere act of submitting a facially truthful payment claim somehow makes an implicit, unsigned certification of compliance with countless statutory and regulatory provisions.

Alternatively, if the Court recognizes the implied-certification theory, the Court should impose strict limits on the theory's use. Any such legal standard should necessitate that the requirement allegedly violated be a condition of federal payment expressly identified as such and contained in a statute, codified regulation, or contract. History shows that Congress and federal agencies are fully capable of identifying those requirements they deem important enough to be conditions of payment and to communicate that fact to the public. Adopting such a legal standard

will help promote compliance by focusing regulated entities' attention on the requirements deemed most essential by Congress and/or federal agencies, eliminating the game of "gotcha" that currently permeates much of relator-prosecuted litigation under the FCA.

ARGUMENT

I. THE COURT SHOULD REJECT THE IMPLIED-CERTIFICATION THEORY, WHICH IS BUILT ON A FOUNDATION OF LEGISLATIVE HISTORY PREVIOUSLY REJECTED BY THIS COURT

In relevant part, the FCA imposes treble damages and per-claim penalties against any person who "knowingly presents, or causes to be presented, a *false* or *fraudulent* claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A) (emphasis added). Although the FCA does not define the words "false" or "fraudulent," Petitioner Universal Health Services, Inc. (UHS) explains in detail why the implied-certification theory strays from the common meaning of those words. *See* UHS Br. 30–33; *see also* 31 U.S.C. § 3729(b) (providing specialized definitions of certain words used in the FCA's liability provision, evidencing that common meaning of words not so defined should control).

Moreover, it is important to recognize that the FCA's use of the words "false" and "fraudulent" are not of recent origin. They have appeared in the statute for over 150 years.

The FCA was first enacted in 1863 "following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department." *United States v. McNinch*, 356 U.S. 595, 599 (1958). In its original form, the FCA authorized suit against "any person . . . who shall make or

cause to be made . . . any claim upon or against the Government of the Unites States . . . knowing such claim to be *false*, fictitious, or *fraudulent* . . . ." Act of Mar. 2, 1863, ch. 67, § 1, 12 Stat. 696 (1863 Act) (emphasis added); *see also* 1863 Act § 3, 12 Stat. at 698 (making § 1 applicable to non-military members).

Over a century later, Congress recodified the FCA and eliminated the word "fictitious" from the 1863 prohibition against "false, fictitious, or fraudulent" claims, changing the statutory phrase to its current "false or fraudulent" form. *See* Act of Sept. 13, 1982, Pub. L. No. 97-258, § 1, 96 Stat. 877, 978. This textual change was designed to "eliminate unnecessary words" and provide "consistency," rather than to enact any substantive change. H.R. Rep. No. 97-651, at 143 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 2037.

Congress amended the FCA once again in 1986. *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153. Importantly, however, the 1986 Congress did not define, amend, or otherwise alter the words "false or fraudulent." The same is true of the 2009 Congress, which retained the statute's "false or fraudulent" language after restructuring the FCA's liability provision. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(a)(1), 123 Stat. 1617, 1621 (codified at 31 U.S.C. § 3729(a)(1)(A)).

In spite of the historical origin of the FCA's use of the words "false" and "fraudulent," many lower courts that have recognized the implied-certification theory have done so based, not on the language of the statute itself, but on language contained in a single

committee report published more than a century after the FCA was first enacted. *See* S. Rep. No. 99-345 (1986) (1986 Senate Report), *reprinted in* 1986 U.S.C.C.A.N. 5265. The report language cited by lower courts is said to demonstrate congressional intent that the words "false" and "fraudulent" should be broadly construed to authorize FCA suits predicated on statutory or regulatory violations. *See, e.g.*, *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 306 (3d Cir. 2011) (citing 1986 Senate Report); *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010) (same); *Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001) (same); *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 531 (10th Cir. 2000) (same). In doing so, however, lower courts have failed to heed this Court's warning that the portion of the 1986 Senate Report at issue provides an inaccurate basis for determining the meaning of words enacted by the 1863 Congress.

The 1986 Senate Report contains a section discussing the history of the FCA and judicial interpretations of the statute. *See* 1986 Senate Report at 8–13. In relevant part, that section of the report asserts that the FCA was

> intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services. Accordingly, a false claim may take many forms, the most common being a claim for goods or services not provided, *or provided in violation of contract terms, specification, statute, or regulation*. . . . A false claim for reimbursement under the Medicare, Medicaid or similar program is actionable under the act, . . .

> and such claims may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program . . . .
>
> . . . Likewise, each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, *or in violation of any statute or applicable regulation*, constitutes a false claim. . . .

1986 Senate Report at 9 (emphasis added).

Putting aside the problem whether one can accurately determine a federal statute's true meaning based on language contained in a single committee report, the intent of the 1863 Congress is what controls the answers to the questions presented by this case, not the intent of the 1986 Congress or individual Members thereof. Such is one of the principal lessons of this Court's decision in *Stevens*.

The Court in *Stevens* was faced with the question whether the FCA liability provision's use of the word "person" included a State. *See* 529 U.S. at 780. The 1986 Senate Report, in the course of purporting to describe the law as it then existed, asserted that States were subject to suit under the FCA. *See* 1986 Senate Report at 8. The Court, however, rejected any reliance on that portion of the 1986 Senate Report because the word "person" had remained in the FCA unchanged since its enactment in 1863. *Stevens*, 529 U.S. at 783 n.12. According to the Court, the passage did nothing more than "set[] forth a Senate Committee's (erroneous) understanding of the meaning of the statutory term enacted some 123 years earlier." *Id.*; *see also Graham County*, 559 U.S. at 298 (finding

letter written by certain Members of Congress was "of scant or no value" in determining meaning of FCA language enacted years earlier).

The same is true here. The 1986 Senate Report's sweeping pronouncements regarding FCA liability based on statutory or regulatory violations are of no interpretive value since the statutory words "false" and "fraudulent" were enacted 123 years earlier. Therefore, "[e]ven for those disposed to allow the meaning of a statute to be determined by a single committee," *Stevens*, 529 U.S. at 783 n.12, the 1986 Senate Report provides no basis on which to answer the fundamental question whether the 1863 Congress intended that FCA liability would be created merely by submitting a payment claim that, although it contained no express false statements, somehow implicitly certified that the person or entity submitting the bill was in compliance with all manner of statutory and regulatory requirements. And there is no evidence that the 1863 Congress intended—or even could have fathomed—such a sweeping result by enacting words creating liability for the submission of "false" or "fraudulent" claims.

II. Alternatively, the Court Should Impose Strict Limits on the Implied-Certification Theory

As this Court explained almost a century ago: "Men must turn square corners when they deal with the Government." *Rock Island, Ark. & La. R.R. Co. v. United States*, 254 U.S. 141, 143 (1920) (Holmes, J.). The converse of the foregoing proposition—the Government must turn square corners with those it regulates and does business with—ought to be true as well.

A. The Direct and Indirect Consequences of FCA Litigation Can Be Profound

The FCA imposes civil penalties as great as $11,000 per false claim, as well as treble damages, attorney's fees, and costs. 31 U.S.C. §§ 3729(a), 3730(d)(1). The face of the statute is enough to give great pause to anyone who submits claims to the Government, and rightfully so. However, the black-letter words of the FCA only tell part of the story.

In the health-care context, for example, an adverse FCA judgment can result in the functional equivalent of the death penalty for a business. Most health-care providers depend on their participation in one or more federal health care programs such as Medicare and Medicaid. The Secretary of Health and Human Services (Secretary) may exclude from participation in such programs any individual "that the Secretary determines has committed an act which is described in section 1320a-7a . . . of this title. . . ." 42 U.S.C. § 1320a-7(b)(7). Section 1320a-7a, in turn, provides civil monetary penalties for any person who, among other things, "knowingly presents or causes to

be presented . . . a claim . . . that the Secretary determines . . . is for a medical or other item or service and the person knows or should know the claim is false or fraudulent." § 1320a-7a(a)(1).

Therefore, running the gauntlet of FCA litigation to its completion—where a jury decides whether, in fact, false claims were submitted—is often viewed as much too dangerous by rational business actors, no matter how valid their factual and legal defenses. The extraordinary cost of proceeding through discovery and to summary judgment also causes numerous defendants with valid defenses to capitulate rather than test the factual accuracy and legal sufficiency of the allegations made against them.

B. The Court Should Cabin Any Use of the Implied-Certification Theory Given the FCA's Punitive Nature

Is it too much for regulated entities to ask of their Government that it use unmistakably clear language when establishing requirements whose violation can give rise to potentially ruinous liability? The answer is a resounding "no." Accordingly, if the Court determines that the implied-certification theory is valid despite the theory's dubious historical origins, the Court should establish a legal standard imposing careful limits on the theory's use. At a minimum, such a legal standard should necessitate that the requirement allegedly violated be (1) a condition of federal payment (2) expressly identified as such and (3) contained in a statute, codified regulation, or contract.

1. The Condition-of-Payment Element

First of all, the requirement allegedly violated must be a condition of payment, not merely a condi-

tion of participation in a federal program. *See, e.g.*, *Wilkins*, 659 F.3d at 307 (so limiting application of implied-certification theory because of the significant risk that not doing so "could turn [the FCA] into a blunt instrument to enforce compliance with all" regulations "rather than only those regulations that are a precondition of payment") (internal quotation marks and citations omitted).

Moreover, the requirement allegedly violated must be a condition of *federal* payment. The FCA does not create liability for obtaining state or private funds to which one might not be entitled. Instead, there must be a connection to federal funds. *See* 31 U.S.C. § 3729(b)(2) (defining the word "claim" for purposes of the FCA's liability provision to include, among other things, "any request or demand . . . for money . . . that . . . is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government . . . will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded").

Take Medicaid, for example, which is the program at issue in this case and one giving rise to significant FCA litigation. As this Court explained in *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S. Ct. 1204, 1208 (2012): "Medicaid is a cooperative federal-state program that provides medical care to needy individuals. To qualify for federal funds, States must submit to [the Centers for Medicare & Medicaid Services (CMS)] a state Medicaid

plan that details the nature and scope of the State's Medicaid program."

Importantly, however, providers who furnish services to Medicaid beneficiaries receive payment directly from the State. 42 C.F.R. § 430.0. The Federal Government, in turn, reimburses the State for a fixed percentage of the expenses incurred by the State. *See* 42 U.S.C. § 1396b.

States create a significant percentage of the regulatory requirements imposed on providers who participate in state Medicaid programs. In this case, for example, no allegation has been made that UHS violated a federal statute or federal regulation governing the delivery of health care. Instead, respondents base their FCA causes of action entirely on the violation of regulations promulgated by the Commonwealth of Massachusetts. *See, e.g.*, 2d Am. Compl. ¶¶ 9–12, J.A. 12–13. No allegation has been made that the Federal Government even knew of the state regulations, let alone that compliance with them was a condition of the Federal Government's agreement to pay the Commonwealth federal matching funds for payments made by the Commonwealth to providers such as UHS. If a State independently imposes a requirement on Medicaid providers that the Federal Government does not require as a condition for the State to draw down federal matching funds, the violation of the state requirement cannot give rise to FCA liability.

2. The Plain-Statement Element

The requirement allegedly violated must also be expressly and unambiguously identified as a condition of federal payment. *See, e.g.*, *Mikes*, 274 F.3d at 700 (finding that implied-certification theory could

be appropriately applied "only when the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid"). Such a plain-statement rule would help promote compliance by the public and avoid FCA litigation altogether, which should be a goal shared by all who seek to do more than personally profit using litigation under the FCA. In addition, a plain-statement standard would help avoid costly and often-opportunistic discovery on whether a requirement is, in fact, a condition of payment—or whether it *was* a condition of payment many years earlier. *See* 31 U.S.C. § 3731(b) (creating FCA statute of limitations that, under certain circumstances, can be extended up to ten years after an alleged violation); *see also* Carrie Johnson, *A Backlog of Cases Alleging Fraud: Whistle-Blower Suits Languish at Justice*, Wash. Post, July 2, 2008, at A1 (reporting that "[m]ore than 900 [FCA] cases alleging . . . billions of dollars [of potential liability] are languishing [under seal] in a backlog that has built up over the past decade because the Justice Department cannot keep pace with the surge in charges brought by whistle-blowers").

3. The Formality Element

Finally, if the Court recognizes the implied-certification theory, the legal standard for using that theory should necessitate that the requirement allegedly violated be contained in a statute, codified regulation, or contract. Agency guidance such as manuals, letters, and answers to "frequently asked questions" posted on an agency's website should not be permitted to create conditions of payment for FCA purposes. Such guidance documents "do not have the

force and effect of law." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1201 (2015) (internal quotation marks and citation omitted); *see also id.* at 1211 (Scalia, J., concurring in judgment) ("An agency may use interpretive rules to *advise* the public by explaining its interpretation of the law. But an agency may not use interpretive rules to *bind* the public by making law . . . ."). Moreover, because such guidance documents are typically not the product of notice-and-comment rulemaking, regulated entities usually have little to no warning that such documents will be issued and little to no ability to assist the agency in making completely informed decisions prior to the guidance's issuance.

* * *

It certainly is true that a legal standard with the above elements would impose an obligation on Congress and federal agencies to carefully consider what should be a condition of payment, the violation of which can give rise to potential FCA liability. However, imposing such an obligation on Congress and federal agencies is abundantly fair when one considers the FCA's "essentially punitive" nature. *Stevens*, 529 U.S. at 784. History also shows that Congress and federal agencies are fully capable of engaging in such an analysis and communicating its results to the public.

For example, when Congress deemed it important that certain Medicaid providers and suppliers educate their employees regarding the FCA and its protections for whistleblowers, Congress enacted statutory language making such education a condition of Medicaid payment. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6032(a)(3), 120 Stat. 4, 73

(2006) (requiring state Medicaid plans to include language whereby providers and suppliers must educate their employees regarding the FCA "as a condition of receiving [Medicaid] payments") (codified at 42 U.S.C. § 1396a(a)(68)). Congress took similar action when it determined that Medicaid payments should not be made for certain conditions acquired while a beneficiary was under the care of a provider. *See* Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 2702, 124 Stat. 119, 318 (2010) (prohibiting federal matching funds for Medicaid payments made to providers for certain "health care-acquired conditions") (codified at 42 U.S.C. § 1396b-1); *see also* ACA § 6402(f)(1), 124 Stat. at 759 (amending anti-kickback statute to expressly provide that a "claim that includes items or services resulting from a violation of this section constitutes a false or fraudulent claim for purposes of" the FCA) (codified at 42 U.S.C. § 1320a-7b(g)); 42 U.S.C. § 1395f (listing "[c]onditions of and limitations on [Medicare] payment for services").

The federal agency implicated by the allegations underlying this case (CMS) also knows how to use notice-and-comment rulemaking in order to promulgate regulations establishing conditions of payment. *See, e.g.*, 42 C.F.R. pt. 424 ("Conditions for Medicare Payment"); Final Rule, 78 Fed. Reg. 50,496, 50,907 (Aug. 19, 2013) (amending Medicare condition-of-payment regulations applicable to inpatient hospitals for professed purpose of "provid[ing] more clarity regarding the relationship between hospital inpatient admission decisions and Medicare payment").

In sum, the Legislative and Executive Branches know how to turn square corners with regulated

entities and those who do business with the Government. The Court should establish a legal standard that requires them to do so before creating potentially ruinous liability under a statute such as the FCA, where alleged violations are typically prosecuted by bounty-seeking private individuals, not the Department of Justice.

CONCLUSION

For the foregoing reasons and those contained in UHS's brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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